



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

Civil Penalty Calculation Methodology

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT

ACTION: Notice

SUMMARY: FMCSA is currently evaluating its civil penalty methodology. Part of this evaluation includes a forthcoming explanation of the Uniform Fine Assessment (UFA) algorithm, which FMCSA currently uses for calculation of civil penalties. UFA takes into account the statutory penalty factors under 49 U.S.C. § 521(b)(2)(D). The evaluation will also consider penalties for small businesses, including the effect of the Small Business Regulatory Enforcement Fairness Act (SBREFA) on those penalties. The purpose of this notice is to clarify the FMCSA methodology for calculation of certain civil penalties. To induce compliance with federal regulations, FMCSA will impose a minimum civil penalty that is calculated by UFA. In many cases involving small businesses, the penalty will be lower than a large business under similar circumstances.

DATES: This clarification of penalty methodology is effective for all Notices of Claim issued on or after **[INSERT DATE OF PUBLICATION OF THIS NOTICE]**.

FOR FURTHER INFORMATION CONTACT: Charles Fromm, Office of Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001, by telephone at (202) 366-3551 or via e-mail at charles.fromm@dot.gov. Office hours are from 9 a.m. to 5 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: In determining the amount of civil penalties for violations of the Federal regulations it administers, FMCSA must take into account “the nature,

circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require.” 49 USC Section 521(b)(2)(D). Significantly, overlaying the nine factors, section 521(b)(2)(D) also requires that the assessed penalty be “calculated to induce further compliance.” *Id.* The Agency may consider certain additional factors, pursuant to the SBREFA, Pub. L. 104-121, § 201 (Mar. 29, 1996).

To take into account the nine statutory factors under § 521(b)(2)(D) in a manner that results in penalties consistent between carriers of similar circumstances, FMCSA uses an automated policy tool called the UFA. The UFA policy has been in effect since 1994. Under a long line of administrative rulings, starting with *Alfred Chew & Martha Chew, dba Alfred & Martha Chew Trucking*, FHWA-1996-5323 (Final Order, Feb. 7 1996), FMCSA and its predecessor agency have held that UFA “is presumed to comply with the requirement of 49 U.S.C. § 521.”

One feature of the UFA program, which takes into account ability to pay and ability to continue to do business, is the Gross Revenue Cap. The Gross Revenue Cap is determined by multiplying the motor carrier’s adjusted gross revenue by a statutory criteria adjustment score. This score is based on the Agency assessment of the violations and the statutory factors.

In *Paul Michels dba Paul Michels Trucking*, (Jan. 27, 2001), the Acting Chief Safety Officer took official notice of UFA. In the Final Order on reconsideration in *Paul Michels*, the Acting Chief Safety Officer found that UFA considered SBREFA by virtue of the Gross Revenue Cap. In a recent administrative review of a proposed civil penalty, the FMCSA Assistant Administrator held that the calculated penalty for a small business in that case, \$1,980,

could not exceed the Gross Revenue Cap calculated by UFA, which was \$490. *Pioneer Drum & Bugle Corps & Color Guard, Inc.*, FMCSA-2008-0012 (Final Order Oct. 4, 2011).

UFA is not, and never was, intended for use where the total proposed penalty is less than \$2,000, however. In such cases, the UFA algorithm may generate a gross revenue cap that is too low to effectively induce compliance with the Federal Motor Carrier Safety Regulations, Federal Hazardous Materials Regulations, and the Federal Motor Carrier Commercial Regulations. Moreover, the administrative burden on the Agency of issuing, settling or adjudicating, and monitoring payment of such low penalty amounts renders this activity contrary to the public interest.

FMCSA therefore will issue a penalty that is equal to the UFA-calculated penalty in all civil enforcement actions when the Gross Revenue cap is \$2,000 or less, even if the Gross Revenue Cap is lower than the calculated penalty. So more precisely, if the UFA per-count calculated penalty and the Gross Revenue Cap are both less than \$2,000, then the penalty will be the lower of (a) \$2,000, or (b) the total of all the per count penalties. In addition, UFA provides a range within which enforcement personnel may exercise discretion over the penalty to be issued, taking into account the statutory factors.

In recognition of SBREFA, FMCSA will impose a penalty that is 20 percent higher against for-hire motor carriers of property with annual gross revenue equal to or greater than \$25.5 million, which is the Small Business Administration's current threshold for small businesses in the trucking industry. FMCSA may continue to reduce the calculated penalty, in its discretion, pursuant to the requirement in section 521(b)(2)(D) that it take into consideration the violator's ability to pay and effect of the penalty on the violator's ability to continue to do business.

If the Gross Revenue Cap is greater than \$2,000 and the calculated penalty is greater than the Gross Revenue Cap, the penalty will continue to be limited to the Gross Revenue Cap, subject to the possible adjustment above and any discretionary reduction based on the motor carrier's ability to pay and ability to continue to do business. For cases where the Gross Revenue Cap is at or above \$2,000, UFA appropriately takes SBREFA into account, and the Gross Revenue Cap will apply. In addition to the above, in all cases, FMCSA may increase or decrease the calculated penalty based on other matters as justice and public safety may require, which is consistent with 49 USC Section 521(b)(2)(D).

SBREFA generally requires agencies to provide for the reduction or waiver of civil penalties for violations of a statutory or regulatory requirement by a small business. SBREFA includes several exceptions to such reductions or waivers, including where the small business

has been subject to multiple enforcement actions, where there has been willful or criminal conduct or in cases where the violations pose a serious health, safety, or environmental threat. SBREFA provides agencies with the flexibility to determine how it will reduce or waive penalties for small businesses. FMCSA believes that a 20 percent difference in penalties between large and small businesses of similar circumstances is a reasonable exercise of the Agency's discretion and balances the principles of SBREFA with the requirement of 49 U.S.C. § 521 to calculate penalties that are designed to induce further compliance with federal laws and regulations. FMCSA also notes that, pursuant to 49 U.S.C. § 113(b), safety must be the Agency's highest priority, and FMCSA's mission to reduce highway deaths and injuries will often require it to refrain from reducing penalties for small businesses where one of the exceptions to SBREFA applies. Consistent with past practice and the Agency's position in *Paul Michels* regarding SBREFA, FMCSA will continue to limit penalties to the UFA-generated Gross Revenue Cap where that cap exceeds \$2,000. In no case will an assessed penalty exceed a statutory maximum.

Issued on: November 10, 2011

Anne S. Ferro

Administrator

[FR Doc. 2011-29783 Filed 11/16/2011 at 8:45 am; Publication Date: 11/17/2011]